In the Supreme Court of the United States

OCTOBER TERM, 1962

No.

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*

v.

ESTATE OF W. R. OLSEN, DECEASED, KENNETH W. OWEN, ET AL., EXECUTORS, AND HAZEL D. OLSEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit in the above-entitled case.

OPINIONS BELOW

The memorandum opinion of the Tax Court (App. 8a-17a)[1] is not officially reported. The opinion of

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[1] "App." refers to the appendix to this petition; "Tr." to the typewritten transcript of the hearing before the Tax Court. The record was not printed in the Court of Appeals, and the case was heard on the original record, which has been certified to this Court. For the Court's convenience, we have printed the Tax Court's findings and opinion in the appendix to this petition (App. 8a-17a).

the court of appeals (App. 1a-7a) is reported at 302 F. 2d 671.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1962 (App. 8a). On July 30, 1962, by order of Mr. Justice White, the time within which to file a petition for a writ of certiorari was extended to and including September 1, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Upon the death of an officer of a corporation, the board of directors authorized the payment, out of corporate assets, of $5,000 to his widow. The question is whether the payment so authorized was a "gift" excludible from the widow's gross income under § 102(a) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> Sec. 102. Gifts and Inheritances.
>
> (a) General Rule.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.
>
> * * * * *

STATEMENT

W. R. Olsen died on September 12, 1955. He was then the secretary-treasurer and a director of, and had been employed for 23 years by, Super Valu Stores, Inc., a publicly-owned corporation of which Mr. Olsen owned less than 2% of the stock. The salary and bonus due Mr. Olsen for his services up to the date of his

death were paid to his estate. The amount due under the terms of a profit-sharing pension trust established by the corporation ($13,623) was paid to Mrs. Olsen as the designated beneficiary of Mr. Olsen. There was no contract or understanding requiring any further payments to be made (App. 11a-12a).

On October 25, 1955, the board of directors of the corporation adopted the following resolution (App. 12a).

> WHEREAS, the death of William R. Olsen constitutes a severe loss to the best interests of this Company; and
>
> WHEREAS, the Board of Directors of this Company recognize the valuable services which W. R. Olsen has rendered to it during the last several years apart from the usual duties and responsibilities of his position:
>
> NOW, THEREFORE, BE IT RESOLVED that the officers of this corporation, and each of them, in the name and on behalf of this corporation, hereby are authorized to pay to the widow of W. R. Olsen, namely, Mrs. Hazel Dart Olsen, $5,000.00 by reason of his death, said amount to be payable forthwith in cash.

The $5,000 payment thus authorized was paid to Mrs. Olsen on October 27, 1955. The corporation deducted the payment as a miscellaneous business expense on its income tax return. On her return, Mrs. Olsen noted the receipt of the $5,000 as "a gratuity in recognition of past services of" Mr. Olsen but claimed that it was a gift excludible from income under § 102(a) (App. 12a-13a). The Commissioner held that the payment was not a gift and determined a deficiency

accordingly.[2] The taxpayers (Mrs. Olsen and her husband's estate, with which she had filed a joint return) petitioned the Tax Court for a redetermination of the deficiency.

In addition to the above facts, the only evidence offered at the trial was the testimony of Russell H. Byerly who, as a director and executive vice president of the corporation, had voted for the resolution. Asked why he had been in favor of the resolution, he replied (Tr. 22-23):

> A. Mr. Olsen's death was quite sudden, he had long, distinguished and faithful service with our company. We felt that this payment to his widow at that time was in order and felt that she probably could use the money under those circumstances.

He testified that a similar payment had been made to the widow of a vice-president who had died several years before Mr. Olsen and that another such payment had been authorized since Mr. Olsen's death, but that there was no established policy governing the making of such payments (Tr. 24-25).

The Tax Court found that (App. 13a):

> The dominant reason for the corporation's action in making the $5,000 payment to the peti-

[2] If not a gift, the $5,000 payment was nevertheless excludible under § 101(b) of the 1954 Code, which excludes, up to $5,000, amounts paid by an employer to an employee's beneficiaries "by reason of the death of the employee"—an exclusion for which, it may be noted, the resolution seems to have been specifically drafted to qualify. Qualification as a "gift" remains important, however, for if the payment under the resolution is excludible as a "gift" under § 102(a), the death-benefit exclusion under § 101(b) remains available to be applied against the $13,623 paid to Mrs. Olsen by the profit-sharing trust. If the $5,000 payment is not a gift, on the other hand, it will exhaust the exclusion available under § 101(b) and leave the trust payment taxable in full.

tioner-widow was that the decedent had rendered valuable services to the corporation, in the performance of unusual duties and responsibilities over a long period of years; and the payment proceeded primarily from the constraining force of a moral duty.

Negatively, the court found that the "dominant reason" for making the payment was *not* "detached and disinterested generosity" or "affection, respect, admiration, charity or like impulses" (App. 16a). The court concluded that the payment, having been made because of the husband's services, was not a "gift" (App. 14a-16a). The Court of Appeals for the Eighth Circuit reversed the conclusion of the Tax Court as "clearly erroneous." Since Mr. Olsen had already been fully compensated for his services, "the only reasonable inference" from the undisputed evidence, the court said, was "that the payment * * * was a gift." (App. 7a).

REASONS FOR GRANTING THE WRIT

This case is in all material respects identical to *Kuntz* v. *Commissioner*, 300 F. 2d 849 (C.A. 6), in which we are simultaneously filing a petition for certiorari. Like the *Kuntz* case, the decision here, reversing the Tax Court's conclusion that the payment was not a gift, is in direct conflict with the decisions of the Third Circuit affirming substantially identical findings by the Tax Court in *Smith* v. *Commissioner* and *Martin* v. *Commissioner*, decided June 28, 1962. For that reason, as more fully stated in our petition in the

Kuntz case, the petition for certiorari in this case should be granted.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

WAYNE G. BARNETT,
Assistant to the Solicitor General.

AUGUST 1962.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,884

ESTATE OF W. R. OLSEN, Deceased, KENNETH M. OWEN and FIRST NATIONAL BANK OF MINNEAPOLIS, Co-Executors, and HAZEL D. OLSEN, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for Review of Decision of The Tax Court of the United States.

[May 4, 1962.]

Before SANBORN and MATTHES, Circuit Judges, and GRAVEN, District Judge.

SANBORN, Circuit Judge.

The petitioners seek a review and reversal of an unreported decision of the Tax Court, filed May 31, 1961, holding that a $5,000 payment made October 27, 1955, to Hazel D. Olsen, the widow of W. R. Olsen, by Super Valu Stores, Inc., the corporation of which he was an officer and director, was not a nontaxable gift to the widow within the meaning of section 102(a) of the Internal Revenue Code of 1954, 26 U.S.C. 1958 ed. § 102(a).[1]

The evidentiary facts are undisputed. W. R. Olsen died September 12, 1955, at the age of 67. He was then secretary-treasurer of Super Valu Stores, Inc. He had been in its employ for more than 23 years. Compensation for his services was paid in full by the corporation up to the time of his death. He owned 3,338 of the

[1] "§ 102. GIFTS AND INHERITANCES.

"(a) *General Rule.*—Gross income does not include the value of property acquired by gift, * * *."

181,479 shares of the common capital stock of the corporation. His wife owned 336 shares, and his son 150. There was no promise or agreement between Mr. Olsen and the corporation that his wife should, upon his death, receive any payment from it. It had no plan or policy of making payments to widows of deceased officers or employees. It had on one prior occasion made a payment to a widow of a vice-president. Mrs. Olsen was not an employee of the corporation, and performed no services for it in connection with the payment in suit.

The resolution authorizing the payment was adopted at a special meeting of the Board of Directors of the corporation held on October 25, 1955, and reads as follows:

> "WHEREAS, the death of William R. Olsen constitutes a severe loss to the best interests of this Company; and
>
> "WHEREAS, the Board of Directors of this Company recognize the valuable services which W. R. Olsen has rendered to it during the last several years apart from the usual duties and responsibilities of his position;
>
> "NOW, THEREFORE, BE IT RESOLVED that the officers of this corporation, and each of them, in the name and on behalf of this corporation, hereby are authorized to pay to the widow of W. R. Olsen, namely, Mrs. Hazel Dart Olsen, $5,000.00 by reason of his death, said amount to be payable forthwith in cash."

Russell W. Byerly, president of the corporation, a witness at the trial, upon being asked his reason for favoring the payment to Mrs. Olsen, testified:

> "Mr. Olsen's death was quite sudden, he had long, distinguished and faithful service with our

company. We felt that this payment to his widow at that time was in order and felt that she probably could use the money under those circumstances."

The corporation, in its income tax return for 1955, deducted the $5,000 payment to Mrs. Olsen under "Other Deductions." The petitioners in their joint income tax return for 1955 did not include the payment as income, and made the following statement in their return:

"In 1955 Hazel D. Olsen, the widow of W. R. Olsen, received from Super Valu Stores, Inc., Hopkins, Minnesota, the former employer of said W. R. Olsen, the sum of $5,000.00 as a gratuity in recognition of past services of said W. R. Olsen. It is the position of taxpayer that said amount is not taxable to her."

The Commissioner determined that the payment was income, and assessed a deficiency.

The Tax Court, on review, sustained the Commissioner, in reliance upon *Estate of Mervin G. Pierpont* v. *Commissioner*, 35 T.C. 65, and what it considers to be the teachings of *Commissioner* v. *Duberstein*, 363 U.S. 278. On petition to review the decision of the Tax Court in the *Pierpont* case that donations made to the widow of Mervin G. Pierpont by the Loewy Drug Company, of which he had, for many years, been president and the majority stockholder, were income, the Court of Appeals for the Fourth Circuit,[2] on March 21, 1962, vacated the decision of the Tax Court and remanded the case, saying (p. ... of ... F. 2d):

"Nevertheless, none of the facts stipulated in the present case touches upon these additional fac-

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[2] *Poyner, et al., Executors of Estate of Mervin G. Pierpont* v. *Commissioner*, ... F. 2d ...

tors which since *Duberstein* have been important. The stipulations were made before *Duberstein* and covered only the criteria which had up to that time been formulated and treated by the Tax Court and this circuit as decisive. It would be unfair now to allow findings to stand, which are adverse to the taxpayer, because of her silence on matters never deemed pertinent in earlier litigation. While, as we have indicated, it is perfectly proper for the court to broaden the field of inquiry beyond that previously established, this should not be done without affording an opportunity to the taxpayer, and to the Government as well, to amplify the record. Of course, we do not undertake to dictate the result to be reached upon the broadened inquiry. Additional data which the parties will be free to produce may have the effect of confirming or overcoming the result which the five *Luntz* [*Florence S. Luntz* v. *Commissioner*, 29 T.C. 647, 650 (1958)] factors,[3] standing alone, were held to require in the earlier cases."

The Court of Appeals for the Sixth Circuit, in *Estate of Martin Kuntz, Sr.* v. *Commissioner*, ... F. 2d ..., decided April 4, 1962, reviewed and reversed a decision of the Tax Court that a donation made to the widow of Martin Kuntz, Sr., upon the death of her husband,

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[3] The factors, quoted in the opinion of the Court of Appeals in *Pierpont*, are (page ... of ... F. 2d):

"(1) [T]he payments had been made to the wife of the deceased employee and not to his estate; (2) there was no obligation on the part of the corporation to pay any additional compensation to the deceased employee; (3) the corporation derived no benefit from the payment; (4) the wife of the deceased employee performed no services for the corporation; and (5) the services of her husband had been fully compensated."

by the Peter Kuntz Company, by which he had been employed for many years and of which he was president at the time of his death, was not excludable from gross income as a gift. The last sentence of the resolution of the Board of Directors of the Kuntz Company was: "This payment is made as additional compensation and in consideration of services heretofore rendered to this corporation by the late Martin C. Kuntz, Sr." There was evidence to the contrary. The Court of Appeals said (page ... of ... F. 2d):

> "We hereby adopt the reasoning and rationale of the *Kasynski* case [*United States* v. *Kasynski*] (284 F. 2d 143, 10 Cir., 1960) in relation to the merits of the instant case. In that opinion the court found that the finding of the lower court—that the intent of the transferor was to make a gift—was a reasonable inference from the 'factual pattern' there present. We here hold that such a finding is the only reasonable inference from the 'factual pattern' *here* present, and that the contrary factual finding by the Tax Court leaves us with 'the definite and firm conviction that a mistake has been committed.' * * *"

If the payment made to Mrs. Kuntz upon the death of her husband was a gift, so was the payment to Mrs. Olsen which the Tax Court has found was not a gift. In *United States* v. *Genevieve E. Frankel*, ... F. 2d ..., we affirmed a determination of the District Court that donations made under similar circumstances to Mrs. Frankel were nontaxable gifts.

The Tax Court, in the instant case, said in its opinion:

> "* * * [T]he dominant reason for the action of Super Valu Stores, Inc., in making the $5,000 payment to the petitioner-widow was that the decedent

had rendered valuable services to the corporation in the performance of unusual duties and responsibilities over a long period of years; and that the payment proceeded primarily from the 'constraining force of [a] moral * * * duty.' "

We are not aware that a corporation has any moral obligation or duty to make any payment to a widow of a deceased officer or employee who, while he lived, was fully compensated for his services. There is no evidentiary basis for an inference that W. R. Olsen was underpaid. There was evidence that he was fully compensated to the time of his death.

This case was tried and submitted to the Tax Court on May 16, 1960. *Commissioner* v. *Duberstein* (363 U.S. 278) was decided by the Supreme Court on June 13, 1960. The record in the Tax Court was based on facts which at the time of trial were adequate to support the conclusion that the payment to Mrs. Olsen was a nontaxable gift. See and compare: *Louise K. Aprill* v. *Commissioner*, 13 T.C. 707 (1949); *Estate of Arthur W. Hellstrom* v. *Commissioner*, 24 T.C. 916, 920 (1955); *Estate of John A. Maycann, Sr.* v. *Commissioner*, 29 T.C. 81 (1957); *Florence S. Luntz* v. *Commissioner*, 29 T.C. 647 (1958); *Bounds* v. *United States*, 4 Cir., 262 F. 2d 876, 881-883 (1958); *Reed* v. *United States* (D.C. W.D.Ky.) 177 F. Supp. 205, 208-209 (1959); aff'd 6 Cir., 277 F. 2d 456 (3/7/1960); *United States* v. *Kasynski*, 10 Cir., 284 F. 2d 143 (a *post-Duberstein* opinion). We could vacate the judgment under review and remand the case to the Tax Court for further proceedings to afford the parties an opporunity to amplify the record, as was done in the *Pierpont* case. The petitioners have not asked that the case be remanded, nor has the Commissioner. Apparently the parties prefer to stand upon the present record. To

remand the case would, in all probability, serve no useful purpose.

The wording of what is now Section 102(a) of the Internal Revenue Code of 1954 is identical with that of Section 22(b)(3) of the Code of 1939, under which the Tax Court and other courts had consistently held that a donation such as that made to Mrs. Olsen was a "gift." There is no reason to believe that Congress in 1954 had any intent to subject to taxation gifts to widows formerly excludable from income under the 1939 Code.

We think that the only reasonable inference to be drawn from the undisputed evidence is that the payment to Mrs. Olsen was a gift and was not taxable. In *Bogardus* v. *Commissioner*, 302 U.S. 34, 40, the Supreme Court said:

> "* * * If it be in fact a gift, that is an end of the matter; and inquiry whether it is a gift of one sort or another is irrelevant. This is necessarily true, for since all gifts are made non-taxable, there can be no such thing under the statute as a taxable gift. A *claim* that it is a gift presents the sole and simple question whether its designation as such is genuine or fictitious—that is to say, whether, though *called* a gift, it is in *reality* compensation. * * *"

We hold that the determination of the Tax Court that the $5,000 payment made by the Super Valu Stores, Inc., to Mrs. Olsen was not excludable from gross income as a "gift" is clearly erroneous.

The decision of the Tax Court is reversed.

Judgment

This cause came on to be heard on the Petition to review the Decision of The Tax Court of the United States entered June 30th, 1961, determining that there is a deficiency in the income tax of the petitioners for the taxable year 1955, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the decision of The Tax Court in this cause be, and the same is hereby, reversed.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said Tax Court for proceedings not inconsistent with the opinion of this Court this day filed herein.

May 4th, 1962.

T. C. Memo. 1961-161

TAX COURT OF THE UNITED STATES

ESTATE OF W. R. OLSEN, Deceased, KENNETH M. OWEN and FIRST NATIONAL BANK OF MINNEAPOLIS, Co-Executors, and HAZEL D. OLSEN, *Petitioners*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Docket No. 73094 Filed May 31, 1961.

Held, that the sum of $5,000 which a corporation paid to the widow of a deceased officer of said corporation, does not constitute a "gift" within the meaning of section 102(a) of the 1954 Code. Principles declared in *Commissioner* v. *Duberstein*, 363 U.S. 278, and in *Estate of Mervin G. Pierpont*, 35 T.C. 65, here applied.

Robert J. Johnson, Esq., for the petitioners.
Joseph D. Skinner, Esq., for the respondent.

Memorandum Findings of Fact and Opinion

PIERCE, *Judge.*

The Commissioner determined a deficiency in petitioners' income tax for the year 1955, in the amount of $2,338.97. This deficiency resulted solely from the Commissioner's determination that the sum of $5,000, which a certain corporation paid to petitioner Hazel D. Olsen by reason of the death of her husband who had been the secretary-treasurer and a director of said corporation, was not excludable from said petitioner's income as a "gift," within the meaning of section 102(a) of the 1954 Code. The Commissioner determined also that, since the maximum exclusion in respect of "employees' death benefits," which is provided by section 101(b)(2)(A) of said Code, had already been applied by petitioners on their return against a profit-sharing trust distribution which said petitioner received, her ordinary income should be increased in the amount of $5,000.

The petitioners, in their petition filed herein, assigned two errors with respect to said determinations, to wit:

(a) Respondent erred in determining that the sum of $5,000 paid to Hazel D. Olsen by Super Valu Stores, Inc. in 1955 was taxable income[,] in that said amount constituted a gift excludable from gross income under Section 102 of the Internal Revenue Code of 1954.

(b) In the alternative, if respondent was correct in determining that said $5,000 payment made by Super Valu Stores, Inc. in 1955 constituted taxable income, then respondent erred in failing to apply the $5,000 exclusion permitted by Section 101(b) of the Internal Revenue Code of 1954 against said amount rather than against the

lump sum distribution received by said Hazel D. Olsen in 1955 from the profit-sharing plan of said W. R. Olsen's employer, in that said $5,000 exclusion should be applied in such manner as will result in the maximum tax benefit therefrom.

The alternative issue raised by the second assignment has now been eliminated. The Commissioner has agreed on brief, that the above-mentioned exclusion in respect of "employees' death benefits," may be applied in its entirety against the $5,000 which petitioner Hazel D. Olsen received directly from Super Valu Stores, Inc., rather than against the distribution which she received from the trustee of the corporation's profit-sharing trust; provided, that the aggregate amount so excluded does not exceed the statutory limitation of $5,000.

Thus, the sole remaining issue for decision is, whether the said sum of $5,000, which petitioner Hazel D. Olsen received from the corporation by reason of her husband's death, is excludable from her income as a "gift," within the meaning of section 102(a) of the 1954 Code.

FINDINGS OF FACT

Most of the facts have been stipulated. The stipulation of facts, together with the exhibits thereto attached, is incorporated herein by reference.

W. R. Olsen (herein called the "decedent") died on September 12, 1955, at the age of 67 years, leaving him surviving: His widow Hazel D. Olsen, who is a resident of Minneapolis, Minnesota; and a son, W. R. Olsen, Jr. The duly qualified and acting coexecutors of the decedent's will are, the First National Bank of Minneapolis, and Kenneth W. Owen. These executors

joined with the widow in filing a joint income tax return for the year 1955 which is here involved; and said executors and the widow are the petitioners herein.

The decedent, at the time of his death, was secretary-treasurer and also a director of Super Valu Stores, Inc., of Hopkins, Minnesota, which engaged in the wholesale food distribution business, and which had approximately 1,450 employees. Decedent had, until his death, been employed by this corporation for over 23 years. The petitioner-widow was not an employee of the corporation at any time here material.

At the time of decedent's death, the corporation had 181,479 shares of common stock outstanding, of which the decedent owned 3,338 shares, his wife owned 336 shares, and his son owned 150 shares. There were some 720 common stockholders.

For the year of his death, the decedent was paid salary and bonuses by the corporation, totaling $16,151.84—some of which amount was received by his executors after his death. None of such compensation is here involved.

Following the decedent's death and in the year 1955, the petitioner-widow received from the trustee of said corporation's qualified profit-sharing trust, the sum of $13,623.65. This amount was paid to her as the decedent's designated beneficiary, by reason of his death; and it constituted full payment and distribution to her of all amounts credited to the decedent on the trust's accounts, up to the time of his death. This distribution is here only indirectly involved.

On October 27, 1955, the petitioner-widow received from the corporation, the sum of $5,000. This payment which is here directly involved, was paid to her pursuant to the following resolution of the corporation's board of directors, approved at a special meeting of said board held on October 25, 1955:

WHEREAS, the death of William R. Olsen constitutes a severe loss to the best interests of this Company; and

WHEREAS, the Board of Directors of this Company recognize the valuable services which W. R. Olsen has rendered to it during the last several years apart from the usual duties and responsibilities of his position;

NOW, THEREFORE BE IT RESOLVED that the officers of this corporation, and each of them, in the name and on behalf of this corporation, hereby are authorized to pay to the widow of W. R. Olsen, namely, Mrs. Hazel Dart Olsen, $5,000.00 by reason of his death, said amount to be payable forthwith in cash.

The corporation did not have any agreement with decedent that any such payment would be made in the event of his death. Also, it had no general plan or policy for making payments to widows of its officers or employees; although it had, on one previous occasion, made such a payment to the widow of one of its vice-presidents.

The taxpayer-widow was not required to, and did not, perform any services for the corporation in connection with said $5,000 payment.

The corporation, in its 1955 income tax return, deducted the $5,000 payment to the taxpayer-widow, under the category of "Other deductions"; and it referred to this deduction in a supporting schedule as "Miscellaneous."

The taxpayers, in their joint income tax return for the year 1955, treated the above-mentioned $13,623.65 which the taxpayer-widow had received from the trustee of the profit-sharing trust, and the above-mentioned

$5,000 which she had received directly from the corporation, as follows:

(1) They treated the $13,623.65 distribution from the trustee, as an "employee's death benefit" within the meaning of section 101(b)(1) of the 1954 Code; deducted therefrom the sum of $5,000, representing the maximum exclusion allowable under section 101(b)(2)(A); and reported the remainder of said distribution ($8,623.65) as taxable long-term capital gain.

(2) They did not include in income, any portion of the $5,000 which the taxpayer-widow had received directly from the corporation; but instead they attached an explanatory statement to the effect that this amount was received "as a gratuity in recognition of past services of said W. R. Olsen [the decedent]"; and that they regarded the same to be nontaxable.

Ultimate Findings

The dominant reason for the corporation's action in making the $5,000 payment to the petitioner-widow was that the decedent had rendered valuable services to the corporation, in the performance of unusual duties and responsibilities over a long period of years; and the payment proceeded primarily from the constraining force of a moral duty.

Said payment was not intended to be, and does not constitute, a "gift" within the meaning of section 102(a) of the 1954 Code.

Opinion

The issue here presented is substantially the same as that which was before this Court in the recent case of *Estate of Mervin G. Pierpont*, 35 T. C. 65, now pending on appeal to the Court of Appeals for the Fourth Circuit. It is our view that the principles therein announced are here applicable.

In said case, we pointed out that the Supreme Court, in *Commissioner* v. *Duberstein*, 363 U.S. 278 (June 13, 1960), had dealt with the vexatious and frequently recurrent question as to what the guiding criteria should be in determining whether a specific transfer without consideration, constitutes a "gift" within the meaning of the pertinent statutory provision.[1] And we there concluded that, although the Supreme Court had declined to lay down the new "test" urged by the Government, its opinion had gone a long way toward bringing the problem back into proper focus, thereby clarifying and developing the law in this troublesome area. We also pointed out in the *Pierpont* case, that the Supreme Court had noted, in its opinion in the *Duberstein* case, that a voluntary transfer (363 U.S. 278, 285) "without any consideration or compensation therefor, though a commonlaw gift, is not necessarily a 'gift' within the meaning of the statute"; and that the Supreme Court further stated (pp. 285-286):

> And, importantly, if the payment proceeds primarily from "the constraining force of any moral or legal duty," or from "the incentive of anticipated benefit" of an economic nature, *Bogardus* v. *Commissioner*, 302 U.S. 34, 41, it is not a gift. And, conversely, "[w]here the payment is in re-

[1] Internal Revenue Code of 1954.

SEC. 102. GIFTS AND INHERITANCES.

(a) General rule.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

turn for services rendered, it is irrelevant that the donor derives no economic benefit from it." *Robertson* v. *United States*, 343 U.S. 711, 714. A gift in the statutory sense, on the other hand, proceeds from a "detached and disinterested generosity," *Commissioner* v. *LoBue*, 351 U.S. 243, 246; "out of affection, respect, admiration, charity or like impulses." *Robertson* v. *United States*, *supra*, at 714. And in this regard, the most critical consideration, * * * is the transferor's "intention." *Bogardus* v. *Commissioner*, 302 U.S. 34, 43. 'What controls is the intention with which payment, however voluntary, has been made.'

* * * * * * *

* * * We take it that the proper criterion, established by decision here, is one that inquires what the basic reason for his [the transferor's] conduct was in fact—the dominant reason that explains his action in making the transfer. * * *

Applying the foregoing guiding principles in the instant case, we are convinced from our consideration and weighing of all the evidence herein (and we have hereinabove found as an ultimate fact), that the dominant reason for the action of Super Valu Stores, Inc., in making the $5,000 payment to the petitioner-widow was that the decedent had rendered valuable services to the corporation in the performance of unusual duties and responsibilities over a long period of years; and that the payment proceeded primarily from the "constraining force of [a] moral * * * duty." This conclusion finds support in the wording of the resolution made by the corporation's board of directors at the time when the payment was authorized; and also in the statement made by the petitioners in their return, that such payment was "in recognition of past services of

said W. R. Olsen [the decedent]." It may be noted also, for what it is worth, that the corporation deducted said payment as a "miscellaneous" expense on its return. We have concluded also that petitioners have failed to carry their burden of establishing that the corporation's "dominant reason" for making the payment proceeded from a "detached and disinterested generosity," and "out of affection, respect, admiration, charity or like impulses."

We think it unnecessary, in view of the clarification of this general subject by the opinion in the *Duberstein* case, to discuss the numerous decisions heretofore entered (either prior to said opinion or without consideration of the principles therein set forth) which have dealt with payments by employers to widows of deceased employees. As we said in the *Pierpont* case, *supra*: "[E]ach case must turn upon its own record, since we think it plain under the *Duberstein* opinion that there is no 'rule of law' or litmus paper test that provides an automatic answer in such cases." We believe that each specific case must be decided on its own particular facts, as appraised in the light of the principles expounded in the *Duberstein* opinion. In addition, we think that *Reed* v. *United States*, 177 F. Supp. 205, affd. without discussion, 277 F. 2d 456, and *Cowan* v. *United States*, ... F. Supp. ..., are each distinguishable on its facts.

We hold, on the basis of all the foregoing, that the $5,000 payment to the petitioner-widow, was not intended to be, and did not constitute, a "gift" within the meaning of section 102(a) of the 1954 Code.

We further hold, in conformity with the above-mentioned alternative position of petitioners and respondent's above-mentioned agreement therewith, that the maximum exclusion in respect of "employees' death benefits" which is provided by section 101(b)(2)(A)

f the 1954 Code, should, in the recomputation under ule 50, be applied in its entirety against said $5,000 ayment from the corporation; and that none of such xclusion should be applied against the amount of the istribution which the petitioner-widow received from he trustee of the profit-sharing trust.

Decision will be entered under Rule 50.

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